LIM FOO YONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) February 11, 1976]
[Kuala Lumpur — Selangor Criminal Appeal No. 183 of 1974]

Criminal Law and Procedure — Case where prosecution relies on circumstantial evidence — Evidence must be inconsistent with any other hypothesis than the guilt of the accused — Charge of failing to declare nature of interest in contract entered into by company — Accused a managing director of company — Knowledge of accused — Whether de minimis rule applicable in criminal cases — Companies Act 1965, s. 131(1).

Companies — Director — Disclosure of interest in contract — Companies Act, 1965, s. 131(1)

The appellant had been convicted on a charge of failing to declare his interest in a contract entered into by a company of which he was the managing director. The vital fact needed to be proved in this case to show the guilt of the accused was his knowledge of the contract. The evidence on this was purely circumstantial.

Held: in this case the learned President Sessions Court had not considered the whole evidence from all angles as she ought to have done and it was impossible to say whether had she not failed to do so she would nevertheless have been compelled to the one conclusion of the appellant's guilt and held that the circumstantial evidence must point irresistibly to the guilt of the accused.

Cases referred to:-

(1) *O'moran* v. *Director of Public Prosecutions* [1975] 2 W.L.R. 413, 421.

(2) *Reg.* v. *Lepine* 15 L.T. 158.

(3) *Coltness Iron Company Ltd. Petitioners* [1951] Scots Law Times Reports 346.

(4) *Idris* v. *Public Prosecutor* [1960] M.L.J. 296.

(5) *Chan Chwen Kong* v. *Public Prosecutor* [1962] M.L.J. 307.

(6) *Chang Kim Siong* v. *Public Prosecutor* [1968] 1 M.L.J. 36 F.C.

(7) *Venkatachalapathi* v. *Gunter Cotton Jute & Paper Mills Co. Ltd. & Ors.* A.I.R. 1928 Mad. 353.

(8) *Karam Singh* v. *Public Prosecutor* [1967] 2 M.L.J. 25.

(9) *Public Prosecutor* v. *Lai Peng Yuen & Ors.* [1968] 1 M.L.J. 11.

CRIMINAL APPEAL.

Peter Mooney for the appellant.

Ee Chin Seng (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: The defendant was charged with an offence under section 131(1) of the Companies Act, 1965. The amended charge was in these terms:

"That you between December 12, 1972 and July 4, 1973 at Hotel Faber Merlin, Kuala Lumpur, in the City of Kuala Lumpur, in the State of Selangor, while being a Managing Director of United Malaysian Steel Mills Bhd., and being directly or indirectly interested in a contract between United Malaysian Steel Mills Bhd. and Ban Guan Sdn. Bhd. signed on December 12, 1972 did fail to declare, as soon as practicable after the relevant facts have come to your knowledge, the nature of your interest in the contract at a Meeting of Directors of United Malaysian Steel Mills Bhd. and that you have thereby committed an offence under section 131(1) of the Companies Act, 1965 and punishable under section 131(8) of the said Act."

He was convicted on this amended charge and because he was a first offender, no sentence of imprisonment was imposed and he was fined $1,500. He appeals against his conviction.

The charge related to the defendant's connection with the United Malaysia Steel Mills Sendirian Berhad, (UMSM) and to his standing in Ban Guan Limited, (BG).

BG was incorporated on January 1, 1954 by the defendant and others. On June 26, 1962 UMSM was incorporated under the name of Sincere Rolling Mills Ltd. The defendant was largely responsible for its incorporation and was its first chairman. Fifty per cent of the shares issued were held by a Hong Kong group and of the other fifty per cent which came to 100,000 shares, BG held 97,000. The remaining 3,000 shares were divided equally between the defendant, one Mok Wan Poh and Ho Yue Hong. These three were also directors of BG.

The defendant ceased to be a director of BG in 1969 but at the times stated in the charge he was an adviser to the company. He was for part of this time a director of UMSM. His connection with UMSM was downgraded following a takeover in 1970, when he resigned as chairman but was appointed its managing director.

The defendant in November 1972 had a personal holding of 16,474 shares in UMSM. His 5 sons on this date together held 537,000 shares. A company called Lim Foong & Sons Realty Sdn. Bhd., (the Realty Company) held 655,000 shares while BG held 167,609 shares. In December 1972, the defendant disposed of 12,900 of his shares and retained 4,574. At the same time the shares held by the members of his family and the two companies were sold to one Ho Sock Win.

As for BG it was incorporated in 1954 with a paid-up capital of 30,000 shares of $10 each. Of this the defendant held at all times 100 shares. The major shareholder was the Realty Company with 20,900 shares. These shares were subsequently sold to Ho Sock Win in 1969. The other shareholders were four of the defendant's sons with something like 7,668 shares. On March 17, 1973, these four sons together with another son, the defendant's two wives and his two daughters acquired a total of 18,646 shares, inferentially from Ho Sock Win.

The Realty Company was incorporated in September 1965 with a paid-up capital of 200 shares at $10 each, which was held by the defendant and his wife equally. Share issues were allocated in 1972 to three of the defendant's sons and at the time of trial, the directors of this company were the defendant, one of his wives and his three sons. This company held 655,000 shares in UMSM. The next company was Syarikat Pertama which had acquired the Eastern Hotel Properties in Jalan Ampang from Dixson & Co., Ltd. for $13 million. This Syarikat was bought over by the defendant in June or July 1972. The defendant had planned a $107 million development project on this site.

The learned President Sessions Court felt that in view of this development BG needed steel and for this reason it turned to UMSM for the supply of steel. She found "it was in respect of the Eastern Hotel project that BG entered into a contract with UMSM on December 12, 1972."

This contract was for the supply of steel of 30,000 tons at set prices ex factory. It was in the form of

which appeared in her grounds of decision to loom very large in her thinking was that the contract was fraudulently negotiated by the defendant with one Lim Tuck Fatt, at that time the Business Manager of UMSM. It sought to create this impression partly by evidence that Lim Tuck Fatt was a relative of the defendant and partly by evidence that the contract was misplaced and not shown to the management until a search for it was made when the demand for the supply of steel in accordance with it was received. The contract was then said to have been found "amongst old files." The suggestion was that it was misplaced on purpose. But it would appear from the evidence that hitherto contracts entered into by officers of UMSM on behalf of UMSM were not required to be told to the Board or ratified by it or anybody on its behalf. Further there was no evidence and (in fact what evidence there was in the other contracts was to the contrary effect) that Lim Tuck Fatt had no authority to enter into contracts of sale and that he was required to advise the Board or the defendant in his capacity as the General Manager. The evidence of Carl Chow that "all contracts not in my knowledge are purported contract (and) no contract is a good contract without my knowledge even of contracts made before I became a General Manager," cannot be true of the facts at the time before his appointment. The earlier part is only true if there is evidence, which there is not, that any contract entered into by Managers and Asst. Managers must receive the prior approval of or be ratified by the General Manager. The second part is wrong in law. It is complete nonsense.

Now there had been a change in personnel. Carl Chow succeeded the defendant and presumably took over, amongst other things, the papers of UMSM from him. He could therefore not have been handed the contract unless it was with the defendant. The prosecution never said it was and did not adduce any evidence to this effect. Lim Tuck Fatt resigned some three months after the contract was concluded. Who succeeded him we are not told but if the contract was with Lim Tuck Fatt as the Business Manager, he would ordinarily have passed it over to his successor. His successor should therefore have been called to give evidence that he did not receive the contract from Lim Tuck Fatt. This was positive evidence which would establish satisfactorily that the contract was purposefully "hidden", a word which Carl Chow used but on being pressed in cross-examination, he withdrew but which the prosecution still contended was the fact from the circumstances. In my view, the failure to call Lim Tuck Fatt or his successor must raise, as a matter of evidence, the presumption under section 114(g) Evidence Act against the prosecution. The president sessions court was asked to do so. She refused. She might be right in respect of Lim Tuck Fatt alone but if she had considered the failure of the prosecution to call the successor to Lim Tuck Fatt after failing or refusing to call Lim Tuck Fatt, she would not, I feel confident, have refused to do so. In the absence of his successor, Lim Tuck Fatt in my respectful view was a necessary witness for the prosecution.

It is therefore obvious and beyond argument that the learned President Sessions Court had, with respect, not considered the whole evidence from all angles, as she ought to have done: see the judgment of the Federal Court in *Karam Singh* v. *Public Prosecutor*[8] where it was held that

> "In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. Where the judge had omitted to view the relevant fact from all angles and the case was not put to the jury in a way to ensure due appreciation of the value of the evidence, there had been a miscarriage of justice."

Failure to direct her own mind as a trial judge of fact, sitting alone, is of course the same as failure to direct the jury correctly. It is impossible to say whether had she not failed to do so, she would nevertheless have been "compelled to the one conclusion" of the defendant's guilt: see *Idris* v. *Public Prosecutor*, *supra* or held that "the circumstantial evidence must point irresistibly to the guilt of the accused," per Ismail Khan J. (as he then was) in *Public Prosecutor* v. *Lai Peng Yuen & Ors.*[9]

The appeal must therefore be allowed, the conviction quashed and the fine if paid refunded.

Appeal allowed.

Solicitors: *Skrine & Co.*

FAN YEW TENG v. GOVERNMENT OF MALAYSIA

[O.C.J. (Chang Min Tat J.) March 16, 1976]
[Kuala Lumpur — Originating Summons No. 435 of 1975]

Administrative Law — Membership of Dewan Ra'ayat — Conviction for sedition and fine of $2,000 — Disqualification — Jurisdiction of Dewan Ra'ayat — Whether court can interfere — Federal Constitution, arts. 48, 53 and 63.

Constitutional Law — Parliament — Member of — Decision on issue of disqualification — Federal Constitution, arts. 48, 53 and 63.

Practice and Procedure — Whether Government a necessary party.

The plaintiff applied for various declarations arising out of his conviction for sedition and a fine of $2,000 imposed on him in the High Court ([1975] 1 M.L.J. 176). A motion had been introduced into the Dewan Ra'ayat that the question whether the plaintiff has become disqualified for membership of the House be referred to the Committee of Privileges. The plaintiff sought declarations in effect that he had a right to exhaust his legal right of appeal and to petition the Yang Dipertuan Agung for a pardon before the Dewan Ra'ayat could take a decision in his disqualification; and that it was only the Dewan Ra'ayat and not the Committee of Privileges which could go into the question of his disqualification.

Held: (1) the decision on the issue of disqualification is for the Dewan Ra'ayat to take and when taken it is final and cannot be questioned in any court;

(2) the court cannot interfere with the right of the Dewan Ra'ayat to decide the question of the plaintiff being disqualified from membership and the reliefs sought by the plaintiff are outside the jurisdiction of the court;

(3) the Government of Malaysia cannot be a proper defendant from whom the reliefs sought, even if available, could be made, and therefore the Government was not a necessary party to the proceedings.

Cases referred to:-

(1) *The Sheriff of Middlesex* (1840) 113 E.R. 149.
(2) *Howard* v. *Gossett* (1845) 116 E.R. 139.
(3) *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271.
(4) *Sharma's Case* A.I.R. 1959 S.C. 395.
(5) *Special Reference No. 1 of 1964* A.I.R. 1965 S.C. 745.
(6) *Brundaban Nayak* v. *Election Commission of India & Anor.* A.I.R. 1965 S.C. 1893.